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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 195

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 37, ET AL., APPELLANTS

v.

JOHN P. BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE APPELLEE

ORDER BELOW

The opinion of the specially convened three-judge District Court is reported in 111 F. Supp. 802 (R. 7).

JURISDICTION

The order of the District Court dismissing the complaint was entered April 10, 1953 (R. 14). A motion for rehearing was filed April 20, 1953 and was denied by order of the Court entered April 21, 1953 (R. 14, 15). The petition for appeal was filed in the District Court on June 22,

1953 (R. 15), and was allowed the same day by order of the District Court (R. 17). On October 12, 1953 this Court directed that jurisdiction be postponed to the hearing of the case on the merits and requested appellants to discuss on brief and oral argument the right of the union to sue for injunction upon behalf of its members (R. 20). Jurisdiction of this Court to review on direct appeal the judgment of the District Court denying the injunction prayed for and dismissing the complaint is invoked under 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

1. Whether this appeal presents a controversy cognizable by this Court.

a. Whether appellant union, not directly reached by the statute, has standing to challenge its constitutionality merely because some members of the union are aliens who eventually may be affected by enforcement of the statute.

b. Whether the controversy is justiciable since there is no allegation that any effort has yet been made to enforce the terms of the statute against appellants or any individuals they purport to represent.

c. Whether the Attorney General is a necessary party since he is charged with enforcement of the statute throughout the United States.

d. Whether enforcement of the statute can be challenged except in habeas corpus proceedings.

2. Whether Section 212 (d) (7) of the Immigration and Nationality Act of 1952 requiring aliens arriving from Alaska to qualify for admission is properly interpreted as applying to aliens who have established legal residence in continental United States and are returning from a temporary visit to Alaska.

3. Whether the section so construed is constitutional.

STATUTES INVOLVED

In Section 212 (a) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U. S. C. A. 1182 (a), Congress has provided that:

> Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States: * * *.

This subsection then proceeds to list 31 categories of inadmissible aliens, including those deemed objectionable for subversiveness, criminality, and physical or mental afflictions.

Section 212 (d) (7) of the Immigration and Nationality Act, 66 Stat. 188, 8 U. S. C. A. 1182 (d) (7), specifies additionally:

> The provisions of subsection (a) of this section, except paragraphs (20), (21), and (26),[1] shall be applicable to any alien who

[1] Paragraphs (20) and (21) relate to the documents that must be presented by aliens seeking permanent admission as immigrants; paragraph (26) describes the documents for aliens seeking temporary admission as nonimmigrants.

shall leave Hawaii, Alaska, Guam, Pue
Rico, or the Virgin Islands of the Uni
States, and who seeks to enter the co
nental United States or any other place
der the jurisdiction of the United Stat
Provided,[2] That persons who were admit
to Hawaii under the last sentence of sect
8 (a) (1) of the Act of March 24, 1934,
amended (48 Stat. 456), and aliens w
were admitted to Hawaii as nationals
the United States shall not be excepted
this paragraph from the application
paragraphs (20) and (21) of subsecti
(a) of this section, unless they belong
a class declared to be nonquota immigra
under the provisions of section 101
(27) of this Act, other than subparagra
(C) thereof, or unless they were admit
to Hawaii with an immigration visa. T
Attorney General shall by regulations p
vide a method and procedure for the te
porary admission to the United States
the aliens described in this proviso. A
alien described in this paragraph, who
excluded from admission to the Uni
States, shall be immediately deported
the manner provided by section 237 (a)
this Act.

STATEMENT

This action was brought by International Lo
shoremen's and Warehousemen's Union, Local
and by its president and business agent on beh

[2] This proviso relates primarily to Filipino laborers
mitted to Hawaii under limited passports.

of all members of the union who are aliens lawfully residing in the United States (R. 1 and 2). The two officers and one member, who joined as a petitioner, were themselves aliens. They sought an injunction restraining respondent, the District Director of the Immigration and Naturalization Service at Seattle, Washington, from interpreting and enforcing Section 212 (d) (7) of the Immigration and Nationality Act of 1952 against the alien members of the union who wished to go to Alaska to engage in seasonal employment. At the request of appellants a three-judge court was convened (R. 7).

The issues were crystallized in a pretrial order to which the parties agreed (R. 1). At the hearing before the three-judge court no evidence was offered other than the agreed facts recited in the pretrial order and in the exhibits attached to it (R. 7).

It appears that the union is composed of over 3,000 persons who work every summer in the herring and salmon canneries of Alaska. Appellants Mensalvas and Mangaoang are the president and business agent of the union, respectively, and with the union seek to maintain the action on behalf of alien members of the union lawfully resident in the United States (R. 1 and 2). Bonilla, an alien member of the union, is a third individual appellant. Two other individual petitioners, Little and Tallido, were alleged to be citizens and they are not appellants here. The

union alleges that it has entered into collectiv
bargaining agreements, on behalf of its member
for employment in the salmon and herring can
ning industry in Alaska and that if members o
the union who are lawful permanent residen
aliens are excluded upon their return to Seattl
from Alaska after the 1953 canning season, thei
property rights in the union and their contrac
rights as members of the union will be jeopardize
and forfeited (R. 2).

It is also alleged that respondent, in interpre
ing Section 212 (d) (7) of the Immigration an
Nationality Act of 1952, has concluded that a
alien members of the union who are lawful pe
manent residents of the United States and who g
to Alaska from Seattle and return to continenta
United States at Seattle will be subject to exclu
sion if they are found inadmissible under th
requirements of the immigration laws (R. 2 an
3). The agreed facts also set forth the procedu
that would be invoked when such aliens retur
from their stay in Alaska, which would includ
inspection by immigration officers, detention fo
further inquiry of those whose admissibility ap
peared doubtful, determination of admissibility b
a special inquiry officer at a hearing, appeal t
the Attorney General from an adverse decision o
the special inquiry officer, and the right to co
lateral review by habeas corpus proceedings in th
event the decision ultimately went against th
aliens involved (R. 3). Finally, it is alleged tha

deportation orders have been entered against appellants Mensalvas and Mangaoang and against three other alien members of the union not parties to the action,[3] which they are challenging by administrative or judicial process, "that they all intend to travel to Alaska this summer in pursuance of their employment rights; and that this employment, pursuant to the contract rights specified above, constitutes the source of a substantial portion of their yearly income" (R. 6).

The agreed issues of law outlined in the pretrial order related to the jurisdiction of the court, the interpretation of the statute, and the constitutionality of such interpretation (R. 4). In its per curiam opinion dated April 10, 1953, the three-judge court found that the court could entertain an action testing whether an officer was acting beyond his statutory authority "and the declaratory judgment, together with an enforcing injunction, furnishes a proper device to test the scope of this authority." (R. 11). The court then found that Section 212 (d) (7) was properly construed as applying to resident aliens returning to continental United States from Alaska, pointing out that the statute "in plain and simple words" relates to "any alien" and that:

> We cannot escape the obvious meaning of the language used. The words "any alien"

[3] Those proceedings do not involve the question here at issue since they are not based on an entry from Alaska.

include aliens situated as are those here involved. [R. 12.]

Finally, the court rejected the constitutional attack, stating that "the vast and broad powers of Congress" to legislate in regard to the admission or expulsion of aliens overbalanced and overcame the limited constitutional protections afforded to resident aliens. The court found no constitutional limitation which precludes Congress from adopting similar classifications, for the purpose of exclusion, in dealing with lawful resident aliens seeking to reenter continental United States from a territory of the United States and from a foreign country. (R. 13–14).

SUMMARY OF ARGUMENT

I

Jurisdiction of the subject matter and parties is lacking for four enumerated reasons, some of which involve similar considerations.

First, the union cannot maintain this suit, since it is not the real party in interest. No statute is being enforced against it, directly or indirectly. No right of the union is being violated or threatened. The complaint relates only to the rights of individual members of the union who may wish to go to Alaska. The union derives no right from them to attack the statute.

Second, the controversy is not justiciable. Under the Constitution the federal courts decide only cases and controversies. No action under

the statute has yet been taken against appellants. Nor is there any certainty that any of the appellants ever will be subjected to the mandates of the statute. It appears therefore that appellants are soliciting an advisory ruling in a hypothetical, not an actual, case. This is not a justiciable controversy under the Constitution. Indeed, that was the direct holding in *United Public Workers* v. *Mitchell,* 330 U. S. 75, in which the facts were closely analogous.

Third, the action must fail because of the absence of an indispensable party, the Attorney General. In *Williams* v. *Fanning,* 332 U. S. 490, and *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, this Court found that a subordinate officer could be sued if the controversy was localized and the relief sought would expend itself on him. Here the relief cannot be effectively granted by an order against the respondent District Director alone, since the decision on entry is delegated to other officials and any action by him would not be binding on any other District Director, or on the Commissioner of Immigration and Naturalization and the Attorney General. Under the statute and regulations all responsibility resides in the Attorney General, and the power of decision is exercised on his behalf by special inquiry officers, subject to final decision on appeal by the Board of Immigration Appeals, sitting in Washington, D. C. Virtually all the cases in the lower courts have concluded that the Attorney General is an

indispensable party to an action seeking to review an order of deportation. *E. g., Paolo* v. *Garfinkel,* 200 F. 2d 280 (C. A. 3).

Fourth, the remedy is inappropriate. In *Heikkila* v. *Barber,* 345 U. S. 229, this Court held that habeas corpus is the exclusive remedy to review an order of deportation. That conclusion has just been reaffirmed, in relation to an exclusion order, in *Tom We Shung* v. *Brownell,* decided December 7, 1953. If habeas corpus remains the exclusive method of review under the 1952 Act, the point at issue in *Brownell* v. *Rubinstein,* No. 300, this Term, then the anticipatory relief sought in this action is improper. Moreover, habeas corpus would resolve the immediate issues raised in this proceeding, and thus affords a complete remedy.

II

The merits will be reached only if all these jurisdictional attacks fail. Before examining the question of constitutionality, it will be necessary to determine whether the statute properly is construed as applying to alien residents of the United States returning from a temporary visit to Alaska. Sec. 212 (d) (7) of the Immigration and Nationality Act applies the excluding provisions of the immigration laws to "any alien who shall leave Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks to enter the continental United

States." The previous statute had a similar provision relating to arrivals from insular possessions. The principal change effected by the 1952 Act was the extension of these requirements to entries from Alaska.

Restrictions against entries from insular possessions have been enforced, without any successful challenge, for 50 years. In the studies which preceded the 1952 Act Congress considered the feasibility of ending them. Instead, they were retained and enlarged by the inclusion of Alaska. Efforts were made to eliminate Sec. 212 (d) (7) on the floor of the House of Representatives, but the amendment was voted down. The debate indicates that Congress was impressed with the need for providing a screening process to prevent the free movement of subversives from the territorial possessions to continental United States.

There is nothing in the language of Sec. 212 (d) (7) or its history to support a thesis that it was not intended to control alien lawful residents returning to continental United States from a territory in the same way that the Act applies to resident aliens who go abroad to a foreign place. And there can be no warrant for changing the unambiguous, unqualified language of the statute. Morever, it seems evident that Congress did not contemplate a limited reading.

Resident aliens who leave the United States voluntarily never have been deemed to have a vested right to return. Numerous decisions of

this court have held that a returning resident alien is subject to all the exclusions of the immigration laws when he seeks to reenter. *The Chinese Exclusion Case,* 130 U. S. 581; *Lem Moon Sing* v. *United States,* 158 U. S. 538; *Polymeris* v. *Trudell,* 284 U. S. 279; *Shaughnessy* v. *Mezei,* 345 U. S. 206. Sec. 212 (d) (7) should be read in the light of these holdings, as one element in an overall legislative design to bar objectionable alien residents who seek to return to the United States. For the purposes of this statute Congress assimilated Alaska to a foreign country. Although the explicit directions of the statute eliminate any need for fathoming the legislative purpose, it seems evident that in applying this restriction to travel from Alaska, Congress deemed that aliens guilty of subversion and criminality in the United States may be more objectionable than those coming from abroad. Congress doubtless also was aware of the exposed situation of Alaska, its proximity to Soviet Siberia, and the fact that aliens coming from Alaska must journey hundreds of miles before coming to continental United States.

Chew v. *Colding,* 344 U. S. 590, seems entirely inapplicable. There this Court merely concluded that under the circumstances of that case it was unfair to deny a hearing. The limited holding of that case was described in *Shaughnessy* v. *Mezei,* 345 U. S. 206.

III

As so construed, the statute is constitutional. The privilege of entering or remaining in the United States can not be characterized as a vested interest, entitled to protection under the Constitution. On the contrary, numerous decisions of this court have concluded that Congress has sovereign power to determine which aliens shall be permitted to enter the United States and which shall be permitted to remain, and that the courts cannot reexamine such political determinations. The controlling principles were reviewed and reaffirmed in *Harisiades* v. *Shaughnessy,* 342 U. S. 580 and *Shaughnessy* v. *Mezei,* 345 U. S. 206. The latter case also confirmed many previous decisions which supported the exclusion of resident aliens seeking to return from a temporary absence. The fullness of the legislative power over the subject precludes any contention that its exercise by Congress has deprived an alien of a vested interest without due process of law.

There is nothing in the Constitution which prevents the exercise of this complete power in regard to aliens seeking to enter continental United States from Alaska. Although Alaska is an organized territory, it is not yet a state of the Union. While Alaska concededly is not foreign territory, there is no reason why it must be treated as part of the United States for every legislative purpose. As a territory, the provisions

of the Constitution safeguarding "fundamental" rights are applicable. But no "fundamental" right to travel from Alaska to continental United States can be claimed by aliens.

So long as Alaska remains a territory, it remains subject to the plenary control of Congress, under Art. IV, Sec. 3, cl. 2 of the Constitution. *Alaska* v. *Troy,* 258 U. S. 101, directly sanctions the establishment of special controls for commerce and travel from Alaska.

Even if it is assumed that the reasonableness of the classification can be examined in this case, the classification clearly is reasonable. It stems from the Congressional concern with alien subversives, its desire to limit their mobility, and with its feeling that screening is needed because of Alaska's special situation, particularly its proximity to Soviet Siberia.

ARGUMENT

I

The Court lacks jurisdiction over the subject matter and the parties

The cause of action urged by appellants suffers from a number of infirmities which preclude the grant of relief. We believe that the union may not properly maintain this action, that the controversy is not a justiciable one at this stage since no action has been taken against appellants, that the Attorney General is a necessary party, and that appellants have misconceived their remedy.

A. The union cannot maintain this suit

In attempting to vindicate alleged personal rights of its alien members under the federal immigration statute and under the Federal Constitution, we believe the union has misconceived its function. The individual members of a union doubtless are subject to the impact of many different laws. To assert that a union may bring suit to test the validity of such legislation, like a mother hen sheltering her flock, seems to us to distort the role of the union as the representative of its members in dealing with their employers. Moreover, it exposes limitless possibilities of litigation brought by "protectors" of others, instituted and conducted without the knowledge or participation of the supposed beneficiaries and in which such beneficiaries will not necessarily be bound by the conclusions reached. Such a concept seems utterly foreign to every requirement of orderly jurisprudence.

While there now is no doubt that a union has capacity to sue and be sued in the federal courts,[4] the union is not a proper party to this contro-

[4] At common law an unincorporated association had no capacity to sue, unless a specific right of action was conferred by statute. *Moffat Tunnel League* v. *United States*, 289 U. S. 113. However, this preclusion has been modified by court decisions and by statute. *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; Rule 17 (b), Federal Rules of Civil Procedure; Section 301 (b), Labor Management Relations Act of 1947, 29 U. S. C., Supp. V, 185 (b); *I. L. W. U.* v. *Juneau Spruce Corp.*, 342 U. S. 237, 241.

versy. The union as such is not here involved. It is not an alien. No statute or regulation is or will be enforced against it. It will not leave the United States and be faced with the possibility of exclusion in seeking to return.

A suit must be brought by the real party in interest. Rule 17 (a) of the Federal Rules of Civil Procedure provides:

> Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; * * *.

Many cases have established that in order to qualify as "the real party in interest" a plaintiff must demonstrate that he has a direct, legal interest in the outcome of the litigation, and courts have dismissed attempts to sue by persons whose interest was remote, indirect, speculative, and sentimental. *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405; *Moffat Tunnel League* v. *United States,* 289 U. S. 113; *Toomer* v. *Witsell,* 334 U. S. 385; *Consolidated Gas Co.* v. *Newton,* 256 Fed. 238 (S. D. N. Y.), affirmed, 260 Fed. 1022 (C. A. 2), certiorari denied, 250 U. S. 671; *Walling* v. *Miller,* 138 F. 2d 629 (C. A. 8). In the

Moffat Tunnel League case this Court found that an association was not the real party in interest in attempting to sue on behalf of its members, and observed, 289 U. S. at 119:

> Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. [Citing cases.] Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one. *It is no more than a sentiment,* such as may be entertained by members of the public * * *. [Emphasis added.]

Manifestly this mandate governs actions which question the constitutionality of a statute. One who attacks the statute must show that he is directly affected. Thus this Court declared in *Heald* v. *District of Columbia,* 259 U. S. 114, 123:

> It has been repeatedly held that one who would strike down a * * * statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the act is unconstitutional and that the alleged unconstitutional feature injures him. [Citing cases.]

See also *Premier-Pabst Sales Co.* v. *Grosscup,* 298 U. S. 226; *Barrows* v. *Jackson,* 346 U. S. 249; *In re George F. Nord Bldg. Corp.,* 129 F. 2d 173 (C. A. 7), certiorari denied, *sub nom. Kausal* v. *79th and Escanaba Corp.,* 317 U. S. 670.

Special provision is made for so-called class actions in Rule 23 (a) of the Federal Rules of

Civil Procedure, which authorizes in certain enumerated situations the maintenance of representative suits:

> If *persons constituting a class* are so numerous as to make it impracticable to bring them all before the court, *such of them,* one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued * * *. [Emphasis added.]

This rule is a codification of earlier equitable doctrines. 6 *Cyclopedia of Federal Procedure* (3d ed., 1951) 660. It does not give an unlimited right of representation but merely specifies the conditions under which a representative suit may be maintained. One of those conditions is that the person prosecuting the suit must be a member of the class. Another is that he must be a real party in interest within the mandate of Rule 17. *Id.* pp. 667, 669; 2 Barron and Holtzoff, *Federal Practice and Procedure* (1950) 6, 8. Local 37 is not an alien and therefore not a member of the class it seeks to represent.

Where the union has no direct interest, its solicitude for the welfare and the civil rights of its members will not entitle it to volunteer protection for such rights through litigation. Only the individuals whose rights allegedly are being infringed are proper parties to such a suit. Thus in *Hague* v. *C. I. O.,* 307 U. S. 496, a union and individual members sued to restrain alleged interference with

constitutional rights. The Court found that the issues raised in the proceeding touched the individual constitutional rights of the members and that "only the individual respondents may, therefore, maintain this suit."[5] 307 U. S. at 514.

In *Milk Wagon Drivers' Union* v. *Associated Milk Dealers,* 39 F. Supp. 671, 672 (N. D. Ill.), a union sued milk dealers in Chicago to recover back wages on behalf of the members. The court held that the union was not a party in interest and could not sue on behalf of its members. The court stated:

> This is not a proper class action. Each milk wagon driver has his individual claim which he is entitled himself to prosecute. It would be a strange situation indeed if some one else, either labor union or labor union officer, were permitted to institute an action embodying the claims of perhaps thousands of individuals and they, without ever knowing such an action was instituted, were to be bound by the result of that suit.

The court cited *Hansberry* v. *Lee,* 311 U. S. 32, in which the limitations of class suits are described.[6]

[5] The American Civil Liberties Union likewise was held not to be a proper party.

[6] In *United Public Workers* v. *Mitchell,* 330 U. S. 75, a union sought to join with its members in an action to protect their constitutional rights. The lower court, although apparently doubtful of the union's standing to sue, did not find it necessary to pass on this issue, holding that the in-

It seems manifest, in the light of these precep
that the union here is not the real party in i
terest. The union apparently is motivated by
benevolent concern for the welfare of some of
members. Obviously if only two members of t
union were aliens, the union could not claim th
its interest would be affected. The fact that
this particular case, there may be a somewh
larger number of alien members does not alt
the situation. It is still clear that the union
such in its collective capacity has no direct i
terest in this suit. Appellants "are not the cha
pions of any rights except their own." *Henn
ford* v. *Silas Mason Co.*, 300 U. S. 577, 583. Ea
aggrieved alien member is fully competent to ta
advantage of any remedies that may be availabl

The union's allegations of rights in additi
to those of its members do not improve its stan
ing to sue. It is said that the union has a co
tract with Alaskan canneries and wishes its ali

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dividual plaintiffs had a cause of action. 56 F. Supp. 6
624 (D. C.). The union's status was neither questioned n
determined in this Court. 330 U. S. at 82, Note 10. Howev
the reasoning of the prevailing opinion in that case appears
exclude any standing to sue on the part of the union. S
pp. 25–27, *infra*.

[7] In appellants' brief it is stated that twelve exclusion pr
ceedings are pending against members of the union. Ea
of these will be able to test his rights in the exclusion pr
ceeding and, if unsuccessful, will be able to bring habe
corpus proceedings. The brief does not specify that any
appellants are involved in such exclusion proceedings. S
note 9, *infra*, p. 24.

members to have a share in fulfilling that contract. But this tangential concern is not a legal interest. There is no showing that any measure is aimed at the union or that it has suffered or will suffer any deprivation. Indeed, there is no suggestion that it has been or will be unable to meet any commitments on its contracts.

None of the authorities cited by appellants is relevant. *Buchanan* v. *Warley,* 245 U. S. 60, was a suit for specific performance, contested on the ground that the contract was void as offending a local ordinance prohibiting sale to Negroes. The Court agreed that an attack on constitutionalty must be "made by those whose rights are directly affected by the law or ordinance in question." (p. 72). However, the court found that: "In this case the property rights of the plaintiff in error are directly and necessarily involved" (p. 73).

Pierce v. *Society of Sisters,* 268 U. S. 510, held that a private school had standing to challenge the constitutionality of a statute compelling attendance in public schools, on the ground that its interests were directly affected. The Court stated: "Their interest is clear and immediate" (p. 536).

In *Truax* v. *Raich,* 239 U. S. 33, the law required the employer to discharge alien employees. The employee was held a proper party in a suit to enjoin enforcement, and the Court pointed out that unless the suit was allowed he would be without adequate remedy. The Court also observed, 239 U. S. at 39:

> It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting of the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote.

In *Joint Anti-Fascist Refugee Comm.* v. *McGrath,* 341 U. S. 123, the control over the members of the association was imposed by reason of their membership in the organization whereas here membership in the union has no relation to the question at issue. Moreover, in that case the results on the association were found to be immediate and direct whereas here they are remote and indirect.

And in *Barrows* v. *Jackson,* 346 U. S. 249, the Court approved the "salutary rule" that only the person directly affected could question constitutionality, but found "unique" circumstances requiring the award of relief to prevent the enforcement of contracts in violation of the Constitution.

None of these cases, and none we have encountered, has endorsed an attack on the constitutionality of a statute by a party against whom the statute is not enforced, directly or indirectly, and where the persons directly affected are fully able to defend their own rights.

Nor is there any substance in the claim that there has been a waiver of the objection to suit by the union (App. Br. p. 13). This claim runs counter to Rule 12 (b) of the Federal Rules of

Civil Procedure which provides that the defense of "failure to state a claim upon which relief can be granted," the defense of "failure to join an indispensable party" are not waived by failure to move before trial. There is no claim here that the union lacks legal capacity to sue. Cf. *McCandless* v. *Furlaud,* 293 U. S. 67. On the contrary, the objection is that relief cannot be granted on the union's claim. This objection was actually raised in the court below by the contention that the complaint did not state a cause on which relief could be granted.[8]

B. This is not a justiciable controversy

In the preceding section of the brief we have pointed out the reasons we believe that the Union is not a proper party to this action. As is pointed out above, *supra,* p. 5, three individual aliens, two of whom are officers of the Union and one a member, joined as petitioners. In this, and the two succeeding sections, we shall deal with reasons why this suit may not be maintained by the individual petitioners, or the Union.

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[8] There is a possibility that the controversy is moot. Although the record indicates that the members of the appellant union "work every summer in the herring and salmon canneries of Alaska" (R. 1, Fdg. II), the remainder of the findings referred to the intention to go to Alaska and return in 1953 only (R. 2, Fdg. VII; R. 6, Fdg. IX) and the union agreement attached as an exhibit to the findings is for the year 1952 only (R. 5). Therefore, it may be that, since the summer of 1953 is past, the controversy has become moot.

In seeking to enjoin the enforcement of Section 212 (d) (7) of the Immigration and Nationality Act of 1952 and to declare their rights under that statute, appellants are anticipating interpretation and enforcement of a statute to which they have not yet been subjected. We have pointed out already that this statute never can be aimed at the union, so that it cannot urge any solid basis for maintaining this suit (p. 16). And the mandate of the statute concededly has not yet been directed against any of the individual appellants.[9] Nor is there any certainty that it ever will be. The court cannot be asked to speculate that the individual appellants ever will leave the continental United States. Nor can it conjecture that they will be excluded if they seek to return.

It seems clear that appellants solicit an advisory determination on a hypothetical case that may never materialize as to them. The aid of the federal courts cannot be enlisted to resolve such inquiries, for under the Constitution the courts

[9] See note 7, *supra*, which refers to the statement in the brief of appellants that twelve members of the union, among whom apparently are none of the appellants, are involved in exclusion proceedings in attempting to return to continental United States from Alaska. For a summary of the official records of the Immigration Service describing the status of these and all other cases in the respondent's District which involve aliens returning from Alaska, see report of the District Director to the Commissioner of Immigration and Naturalization set forth in the Appendix, *infra*, p. 76.

can adjudicate only cases or controversies. U. S. Constitution, Article III, Section 2.

The authorities overwhelmingly reject the notion that appellants can contest the validity of statutory provisions to which they have not yet been subjected, and may never be. Indeed, one decision of this Court seems directly in point. In *United Public Workers* v. *Mitchell,* 330 U. S. 75, a union and a group of its members sought declaratory relief and an injunction to restrain the enforcement of the so-called Hatch Act. They too assailed the statute as unconstitutional. However, the provisions of the statute were being enforced against only one of the individual plaintiffs. The others feared that its commands would be applied to them if they embarked on certain anticipated action. Only the single plaintiff directly affected was found to have any standing in court. The action brought by the union and the other individual plaintiffs was dismissed because it did not present a justiciable controversy. The court pointed out, 330 U. S. at 88: "They declare a desire to act contrary to the rule against political activity but not that the rule has been violated." The language of the opinion seems decisive in disposing of the instant proceeding, 330 U. S. at 89–91:

> As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional

issues, "concrete legal issues, presented in actual cases, not abstractions," are requisite. This is as true of declaratory judgments as any other field. These appellants seem clearly to seek advisory opinions upon broad claims of rights protected by the First, Fifth, Ninth and Tenth Amendments to the Constitution * * * the facts of their personal interest in their civil rights, of the general threat of possible interference with those rights by the Civil Service Commission under its rules, if specified things are done by appellants, does not make a justiciable case or controversy. * * *

The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interference upon the other.

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority. No threat of interference by the Commission with rights of these appellants appears beyond that implied by the existence of the law and the regulations.

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Among the many authorities which contain similar expressions are *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461; *Coffman* v. *Breeze Corps.,* 323 U. S. 316, 324; *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 239–41; *Massachusetts* v. *Mellon,* 262 U. S. 447.

The present case seems virtually indistinguishable from *United Public Workers* v. *Mitchell.* Here too the union and its members are advancing constitutional challenges leveled against a statute in advance of its actual application to any of them. Here too the controversy is speculative and hypothetical. Here too the appellants cannot be awarded the advisory ruling they seek.

The effect, of course, of permitting a suit to be tried in court before it has been commenced administratively or followed its natural course through administrative proceedings, is to shift burdens to the courts which Congress intended to be resolved in the first instance by the special procedures it provided. Basically the issue is not dissimilar to the exhaustion of administrative remedies doctrine expressed by this Court in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 50–52, or *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540, 544. Its application to immigration cases is described in *United States* v. *Sing Tuck,* 194 U. S. 161. If the individuals involved are administratively found not to be covered by the Act, or for some other reason the anticipated controls are not imposed, it will

then be unnecessary to reach the more substantial constitutional issues involved. *Aircraft and Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772. But if, on the other hand, the result of the administrative proceeding is adverse to the individual involved, the case reaches the courts in a definite form, with findings of fact and expert interpretations which narrow and eliminate extraneous issues. Therefore, it would seem appropriate to require appellents to complete the administrative process before soliciting the aid of the courts.

The cases cited by the court below hardly support its finding that the controversy was justiciable. *United States Lines Co.* v. *Shaughnessy,* 195 F. 2d 385 (C. A. 2) surveyed action that had been taken in fourteen actual cases in which the steamship company had been ordered to pay detention expenses for seamen arriving on its vessels. The controversy was thus real, not hypothetical. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, likewise confronted concrete action in listing the complaining organizations as subversive. The Court emphasized that it was granting "relief to parties whose *legal rights have been violated* by unlawful public action * * *." (Emphasis added.) 341 U. S. 141.

Here no rights have been violated, but it is alleged that appellants anticipate such a violation in the event they journey to Alaska. No case cited by appellants or by the court below, and none we have found, ever has deemed that such

an apprehension is justiciable. On the contrary, *United Public Workers* v. *Mitchell, supra,* on closely analogous facts, directly refutes the supposition that the court can grant such a speculative, advisory decree.

Appellants are in no better position to maintain their suit by reason of the fact that they ask for a declaratory judgment. The declaratory judgment process is governed by substantially the same jurisdictional restrictions as other litigation brought in the federal courts. Indeed, the statute itself counsels that the remedy can be invoked only in "a case of actual controversy." 28 U. S. C. 2201. The purpose of this reservation is to confirm the constitutional limitations denying access to the courts until the development of a case ripe for adjudication. Like other forms of action, the declaratory judgment suit cannot be utilized to obtain an advisory decree.

Thus, in *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461, the Court declared:

> The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. * * * This Court is without power to give advisory opinions. * * * It has long been its considered practice not to decide abstract, hypothetical or contingent questions * * *or to decide any constitutional question in advance of the necessity for its decision * * *. [Citing many cases.]

And in *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 239–40, Chief Justice Hughes similarly observed that the Declaratory Judgment Act "manifestly has regard to the constitutional provisions and is operative only in respect to controversies which are such in the constitutional sense."

The holdings of this Court thus emphatically demonstrate that this case must fail because it does not present a justiciable controversy. The appellants will have ample opportunity to challenge the validity or interpretation of the statute when, and if, its mandates are sought to be applied to them.[10]

C. The Attorney General is an indispensable party

This action is brought against a subordinate official of the Department of Justice. It attacks a statute being enforced throughout the United States. We believe the suit must fail because of the absence of an indispensable party, the Attorney General. If his participation in the litigation

[10] The remoteness of any actual controversy is revealed by the nature of the determination sought to be reviewed as reflected in the exhibits attached to the pretrial order (R. 5). While these exhibits were not reproduced in the record, they are on file in the office of the Clerk of this Court. They show that the "determination" actually consisted of a newspaper article, a press release, and a memorandum discussing generally changes effected by the new law. All of these documents were issued before the present law became effective, December 24, 1952. None involved an actual case. See note 11, *infra*, p. 35.

is requisite, the court in Seattle has no jurisdiction, since the Attorney General can be sued only in the District of Columbia, where he has his official residence. *Blackmar* v. *Guerre,* 342 U. S. 512; *Connor* v. *Miller,* 178 F. 2d 755 (C. A. 2).

In *Williams* v. *Fanning,* 332 U. S. 490, this Court attempted to formulate rules to clarify the conditions under which a subordinate officer might be sued. In that case suit was brought against the postmaster at Los Angeles to restrain enforcement of a mail fraud order of the Postmaster General directed against a person doing business in Los Angeles. The Court held that the subordinate officer was properly sued and that the test was (332 U. S. at 494) whether:

> the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court. It seems plain in the present case that that will be the result even though the local postmaster alone is sued. It is he who refuses to pay money orders, who places the stamp "fraudulent" on the mail, who returns the mail to the senders. If he desists in those acts, the matter is at an end. That is all the relief which petitioners seek. The decree in order to be effective need not require the Postmaster General to do a single thing * * *.

This holding was elaborated in *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, 97. The suit was brought against the regional director of Fish and

Wildlife Service to enjoin an order of the Secretary of Interior prohibiting commercial fishing in certain areas in Alaska. The Court found the Secretary of the Interior not an indispensable party and observed:

> Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.

On the other hand, in *Blackmar* v. *Guerre, supra,* the members of the Civil Service Commission were held to be necessary parties to an action which would have involved affirmative action on their part. See also *Money* v. *Wallin,* 186 F. 2d 411 (C. A. 3), certiorari denied, 341 U. S. 935. The instant case falls within the rationale of the *Blackmar* case.

In the *Williams* and *Hynes* cases, all the parties affected, as well as the subject matter of the controversy, and the officer charged with immediate responsibility for executing the order were in the district where the action was brought. The dispute thus had a localized situs and the local

court was in a position to settle the controversy. That is not the situation here. The relief sought cannot "expend itself" on the District Director, and the matter will not be "at an end". Nor can it be said that the decree will be "effective" or that the issues "can be settled" by such a decree. Therefore, we believe the *Williams* and *Hynes* cases inapplicable.

Here the statute gives the Attorney General the power to administer and enforce its terms. Sec. 103 (a), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1103 (a). The Commissioner of Immigration and Naturalization is charged with responsibilities and authorities conferred upon and delegated to him by the Attorney General. *Id.*, Sec. 103 (b). Special inquiry officers are empowered to hear and determine exclusion and deportation proceedings, and are given delegated authority to take certain actions for the Attorney General. Secs. 236 and 242, Immigration and Nationality Act of 1952, 8 U. S. C. A. 1226 and 1252; 8 CFR (1952 rev.) 236.1. Appeals from orders of special inquiry officers are taken to the Board of Immigration Appeals, sitting in Washington, D. C., which has full authority to act on behalf of the Attorney General in deciding appeals from decisions of special inquiry officers in exclusions and deportation cases. 8 CFR (1952 rev.) 6.1 (b).

With respect to the admission of aliens, the sole function of the District Director and the offi-

cers under his control is to examine aliens seeking to enter and detain for further inquiry any alien whose right to land does not appear clear and beyond a doubt. Sec. 235 (b), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1225 (b). Once the alien is detained for further inquiry, the District Director has no responsibility for, or participation in, the process of making a determination on his right to enter.[11] See *Statement of Organization,* Immigration and Naturalization Service, Sections 1.19 and 1.36, 17 F. R. 11,613. Moreover, the entry of an order restraining the District Director from detaining the appellants for further inquiry would only postpone the test of their right to enter. If they proceeded to enter under the protection of such an order, they would immediately be subject to a deportation proceeding either in the District where they entered or any other where they might be found. The first ground set forth for the deportation of an alien is that he "at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry." Section 241 (a) (1), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1251 (a) (1). It is

[11] The record does not indicate what kind of determination has been made. It merely states that "respondent has concluded" that certain aliens "will be subject to" exclusion (R. 2–3, Fact VIII). Cf. R. 5, referring to newspaper article and press release. *Hearst Radio, Inc.* v. *Federal Communications Commission*, 167 F. 2d 225 (C. A. D. C.) See note 10, *supra*, p. 31.

perfectly clear, therefore, that an order addressed to the District Director alone would be ineffective in protecting any interest the alien might have in establishing his rights to enter or remain in the United States.

The lower federal courts have been virtually unanimous in concluding that the Attorney General, or the Commissioner of Immigration and Naturalization, is an indispensable party to an injunction suit or declaratory judgment proceeding challenging the exclusion or deportation of aliens.[12] One of the most carefully reasoned opinions is *Paolo* v. *Garfinkel,* 200 F. 2d 280 (C. A. 3). There the action was brought against an officer in charge to review a deportation order. It was dismissed on the ground that the Commissioner of Immigration and Naturalization was an indispensable party and can be sued only in the District of Columbia. After referring to *Williams* v. *Fanning,* the Court stated, at pp. 281–282:

> Suppose that court, after reviewing the record, decided that the petitioner, Joao Paolo, should not be deported. The court could give an order which would release Mr. Paolo from the custody of Mr. Garfinkel. Suppose that the petitioner then went to another district and was there

[12] This situation is to be distinguished from that prevailing in a petition for *habeas corpus*, which under familiar principles tests the legality of detention and is brought against the custodian, usually the District Director. See *Ahrens* v. *Clark*, 335 U. S. 188; *Shaughnessy* v. *Mezei*, 345 U. S. 206.

> taken into custody by an officer with similar duties, for his geographical area, as those performed by Mr. Garfinkel. An order against Mr. Garfinkel's doing anything to send the petitioner out of the country runs against him, but we have no reason for thinking it would run against the person having similar duties in some other district. What Mr. Garfinkel does in the Western District of Pennsylvania is to carry out the orders of the Commissioner of Immigration and Naturalization whose official home is Washington, D. C. Unless that officer is brought into the litigation and an order made against him we do not see that the petitioner is going to profit much from an order issued against a district official only.

Among the other authorities which support the same conclusion are *Corona* v. *Landon,* 111 F. Supp. 191 (S. D. Cal.); *Chavez* v. *McGranery,* 108 F. Supp. 255 (S. D. Cal.); *Birns* v. *Commissioner,* 103 F. Supp. 180 (N. D. Ohio); *Navarro* v. *Landon,* 108 F. Supp. 922 (S. D. Cal.); *Torres* v. *McGranery,* 111 F. Supp. 241 (S. D. Cal.); *Vaz* v. *Shaughnessy,* 112 F. Supp. 778 (S. D. N. Y.); *Podovinnikoff* v. *Miller,* 179 F. 2d 937 (C. A. 3). A similar conclusion is the least implicit in *Connor* v. *Miller,* 178 F. 2d 755 (C. A. 2).

Not only would a decree against the District Director be ineffective because it could not be controlling in a deportation proceeding instituted on the same grounds, but also even as to original

detention for inquiry it would be effective only in the particular district where the District Director was in charge. There is no specific reason to believe that the aliens here involved would all attempt to reenter the United States at the particular port in the particular district where this proceeding was commenced. An order in this case would not be binding on the Attorney General, the Board of Immigration Appeals, or the Commissioner of Immigration and Naturalization, who have ultimate authority to administer the immigration and nationality laws and to determine the admissibility and deportability of aliens. And it certainly would not bind any other District Director, or the employees acting under him. They would be at liberty to exclude any of the interested aliens or to institute deportation proceedings against them, even on the basis of an asserted irregular entry at Seattle. It therefore appears that under the rule stated in *Williams* v. *Fanning, supra,* this is not the type of situation in which a decree will effectively grant the desired relief by operating on the particular official before the court. Therefore, the Attorney General, or the Commissioner of Immigration and Naturalization, was an indispensable party.

D. The remedy is inappropriate

The plea to restrain enforcement of an immigration statute is virtually unprecedented. In seeking this relief appellants disregard the stat-

utory command that immigration proceedings are to be conducted by an administrative agency, functioning without judicial intervention. And they overlook the existence of habeas corpus as an exclusive remedy.

In *Heikkila* v. *Barber,* 345 U. S. 229, this court held that habeas corpus is the exclusive remedial device for judicial inquiry in deportation cases. The prevailing opinion observed, pp. 234 and 235, that the statute:

> clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. * * * Now, as before, he may attack a deportation order only by habeas corpus.

Moreover, the Court specifically found that relief was precluded under "the general equity powers of the federal courts and the Declaratory Judgment Act." (p. 237) This holding was recently confirmed, in an exclusion case, *Tom We Shung* v. *Brownell,* No. 241, this Term, decided December 7, 1953. The issue under the 1952 Act is presently before the Court in *Brownell* v. *Rubinstein,* No. 300, this Term.

If equitable relief is precluded after the entry of a final order, no reason can be observed why it should not likewise be barred before the institution of the administrative proceeding or while it is in progress. The same considerations are controlling. Cf. *Myers* v. *Bethlehem Shipbuild-*

ing Corp., 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540. The fundamental questions raised here could be decided in a habeas corpus proceeding. Almost without exception, the important decisions of this court regarding the proper interpretation [13] and the constitutionality [14] of immigration statutes, and the fairness of immigration procedures [15] have emerged from habeas corpus proceedings.

The relief summoned by appellants, if sanctioned by this Court, would open up opportunities for litigation delaying and defeating enforcement of the immigration laws upon claims that the statute is misconstrued or that it is unconstitutional. In providing for an expeditious immigration process, Congress sought to avert such dilatory attacks. Consequently, injunctive relief is inappropriate to question enforcement of an immigration statute, since habeas corpus affords an exclusive remedy.

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[13] *E. g.*, *Fong Haw Tan* v. *Phelan*, 333 U. S. 6; *Jordan* v. *DeGeorge*, 341 U. S. 223; *Gegiow* v. *Uhl*, 239 U. S. 3.

[14] *E. g.*, *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *The Chinese Exclusion Case*, 130 U. S. 581.

[15] *E. g.*, *Shaughnessy* v. *Mezei*, 345 U. S. 206; *Knauff* v. *Shaughnessy*, 338 U. S. 537; *The Japanese Immigrant Case*, 189 U. S. 86.

II

The statute is properly construed as applicable to an alien who seeks to return to the continental United States from a sojourn in Alaska

Assuming that the action can be deemed properly brought, the first question on the merits relates to the application of Section 212 (d) (7) to aliens who have established lawful residence in continental United States, have made a visit to Alaska and who are then returning. The view that such aliens are subject to exclusion if they fall within the classes which would originally have been excluded rests on a clear expression of congressional intent. The statute itself specifically declares in Section 212 (d) (7), 8 U. S. C. A. 1182 (d) (7), that its prohibitions "shall be applicable to *any alien* who *shall leave* Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who *seeks to enter* the continental United States or any other place under the jurisdiction of the United States." (Emphasis added.)

This language obviously is couched in unrestricted terms. Congress could have limited the thrust of this enactment to any alien resident of Alaska or any alien not returning to a residence in the United States or any alien seeking to enter continental United States through Alaska. If such a narrow orbit had been contemplated, it would have been a simple matter to chart it. But instead of limiting its compass the statute speaks

generally of "*any alien* who shall leave" Alaska and "who seeks to enter the continental United States." (Emphasis added.) This comprehensive language hardly supports a limited reading. See *Kustas* v. *Williams,* 194 F. 2d 642, 644 (C. A. 2).

Section 212 (d) (7) of the Immigration and Nationality Act of 1952 is not a departure from or radical extension of the historic policies of our immigration laws. On the contrary, it is a codification of a half century's consistent practice announced in statutory and administration directives, which have consistently regarded the insular possessions of the United States for some purposes as the equivalent of a foreign country under the immigration laws. The only important change introduced by the 1952 Act is the extension to Alaska of exclusionary mandates previously applied to all insular possessions of the United States, including Hawaii.

The first statutory recognition of this concept appeared in Section 1 of the Immigration Act of February 5, 1917, 8 U. S. C. 173, which similarly commanded that an alien leaving an insular possession of the United States would not be permitted to enter continental United States "under any other conditions than those applicable to all aliens." This language was deemed inapplicable to Alaska, which was not regarded as an insular possession within the contemplation of the 1917 statute. See *Chai* v. *Bonham,* 165 F. 2d 207 (C. A.

9). But the statute's command always was regarded as encompassing aliens who sought to come to the mainland from Hawaii, which like Alaska enjoys the highest political status among the territories of the United States.

The injunctions of the 1917 Act were consistently enforced, without any successful challenge, in regard to aliens wishing to enter the continental United States from Hawaii. Thus in *Matsuda* v. *Burnett,* 68 F. 2d 272, 273 (C. A. 9), the court found that Japanese aliens lawfully admitted to Hawaii had no right to be admitted to the mainland and stated:

> It is true that the territory of Hawaii is a part of the United States, but it is also an insular possession.

The court declared that although the statute defined Hawaii as part of the United States for some purposes, this definition did not preclude Congress from treating aliens coming from Hawaii as amenable to the restrictions of the immigration laws. To the same effect are *Sugimoto* v. *Nagle,* 38 F. 2d 207 (C. A. 9), certiorari denied, 281 U. S. 745; *Karamoto* v. *Burnett,* 68 F. 2d 278 (C. A. 9).

In the protracted deliberations which preceded the Immigration and Nationality Act of 1952, Congress had ample opportunity to reconsider the policy enunciated in Section 1 of the Immigration Act of 1917. Indeed, the original committee study

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recommended elimination of the restrictions against travel between the territories and possessions of the United States and the mainland, so that "a lawfully admitted alien resident of Hawaii, Puerto Rico, Alaska, and the Virgin Islands may travel between such places, and between such places and the mainland, the same as aliens traveling between any of our 48 States." S. Rep. 1515, 81st Cong., 2d sess., p. 674. And the original draft of the so-called Omnibus Bill (which launched the legislative process that eventually resulted in enactment of the McCarran-Walter Act) issued simultaneously with the Committee study as S. 3455, 81st Cong., 2d sess., likewise contained no restrictions upon travel between Alaska and the United States. Such restrictions, however, were added in subsequent versions of this measure. S. 716, H. R. 2379, and H. R. 2816, 82d Cong., 1st sess.

Undoubtedly, the main purpose of these provisions was to prevent excludable aliens from using entry into and residence in the territorial possessions as a means of entry into the United States.[16] The significant point, however, is that

[16] This was the stated aim of the 1917 Act. S. Rep. 352, 64th Cong., 1st sess., p. 3, commented:

"The second sentence [of section 1] is section 33, act of 1907, amended so as to make it perfectly clear that the admission of an alien to the insular possessions does not privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens have been using the insular territory (particularly the Phil-

it was recognized in the course of debate that these restrictions did assimilate the territorial possessions to the status of a foreign country. Delegate Farrington of Hawaii, who labored diligently to have this restriction changed or eliminated, proposed two amendments to the bill.[17] In a preliminary colloquy with Representative Jenkins, Mr. Farrington observed, 98 Cong. Rec. 4304:

> We are subject to the immigration laws in the same manner as are the States, with several exceptions. One of those exceptions is the requirement that aliens traveling from Hawaii to the mainland shall be subject to the *same restrictions as aliens traveling from a foreign country to Hawaii.* I hope to offer an amendment later to correct that, because I believe it is unnecessary and extremely unjust and imposes restrictions that are nothing more than a nuisance. [Emphasis added.]

Delegate Farrington's first amendment, which sought to grant lawful residence privileges to Filipino laborers in Hawaii, was voted down. 98 Cong.

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ippines) as a 'stepping stone' to the continent, avoiding close inspection by first securing admission to the Philippines and then coming 'coastwise' to the United States proper."

Section 33 of the 1907 Act, 34 Stat. 908, directly affected only aliens seeking to come from the Canal Zone.

[17] Similar objections were voiced by Delegate Farrington and Resident Commissioner Fernós-Isern of Puerto Rico during the final hearings on the bills. See Joint Hearings before Subcommittees on the Judiciary, 82d Cong., 1st sess., on S. 716, H. R. 2379, H. R. 2816, pp. 45–46 and 370.

Rec. 4401–4402. Thereafter Delegate Farrington offered his principal amendment, to strike from Section 212 (d) (7) the restrictions upon travel from Alaska and Hawaii. 98 Cong. Rec. 4404. While the debate referred principally to the situation in Hawaii, it manifestly is relevant also to Alaska. In support of his amendment Mr. Farrington urged that the restrictions against the travel of aliens from Hawaii to the United States had outlived their usefulness, were unnecessary, and were contrary to the national interest. *Id.* 4405–4406. The opposition was led by Representative Walter, coauthor of the bill and its principal sponsor in the House of Representatives. Representative Walter observed, *id.* 4406,

> The only question is whether or not aliens, not citizens of Hawaii, but aliens who happen to be in Hawaii, would be required to be screened before they came to the United States. What great hardship would that work on them? It is important to bear in mind the fact that there are a great many aliens in Hawaii who have never been properly screened . . . It is entirely a question of aliens coming to the United States, and I for one do not think they should be admitted *whether they come from Hawaii or whether they come from Europe, without being screened in order to determine whether or not they are subversive.* [Emphasis added.]

Delegate Farrington's amendment was voted down, *id.* 4406, and the bill ultimately was enacted without any change in the language of this subsection.[18]

Thus, the underlying concept of Section 212 (d) (7), recognized as such by Congress is that, for the purposes of entry into the United States by aliens, the territorial possessions are different from the continental United States and in status like that of a foreign country.

Some have continued to urge that the restrictions upon travel between Alaska and continental United States be eliminated.[19] Indeed, bills to remove this barrier have been introduced in Congress. H. R. 370, S. 952, 83d Cong., 1st Sess. But we believe the legislative policy is explicitly

[18] S. Rep. 1137, 82d Cong., 2d sess., accompanying the final version of the bill, declares, at p. 14:

"Section 212 (d) (7) of the bill continues in effect the special procedures applicable to aliens *who travel from* the Canal Zone, Territories, or outlying possessions to the continental United States or any other territory under the jurisdiction of the United States. Under the bill such procedures will also be applicable to aliens *traveling from Alaska to continental United States.* The requirements of the act of March 24, 1934, as amended (48 Stat. 456), relating to the documentation of certain natives of the Philippine Islands previously admitted to Hawaii are continued in effect." (Emphasis added.)

Substantially the same statement appears in H. Rep. 1365, 82d Cong., 2d Sess., p. 53.

[19] See *Report of the President's Commission on Immigration and Naturalization* (1953) pp. 183–184; *Hearings before the President's Commission on Immigration* (Sept. and Oct. 1952), pp. 1426–1428, 1490–1493.

declared in the statute and that the appropriate forum for urging a change in that policy is in the halls of Congress and not at the bar of this court.

The imposition of restrictions on entry from Alaska is equally applicable to the situation where the alien has previously resided in continental United States, has voluntarily gone to Alaska, and then attempted to return. In the first place there is clearly no exception for this particular situation in the language of the statute. In the second place, such an application is completely consistent with the Congressional policy followed for many years of limiting an alien resident's right to reenter following a brief visit to a foreign country. Repeatedly this court has held that an alien who leaves the United States voluntarily,[20] for however brief an interval, makes an entry under the immigration laws upon his return. This principle was codified, with modifications not here relevant, in Section 101 (a) (13) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. 1101 (a) (13).[21] Moreover, the leading decisions dealing with reentries emphatically dismiss the supposition that a resident alien who leaves the shores of the United States can insist on readmission when he returns. *The Chinese Exclusion Case,* 130 U. S. 581; *Lem Moon Sing* v. *United States,*

[20] An involuntary, unanticipated departure does not result in a new entry upon return to the United States. *Delgadillo* v. *Carmichael,* 332 U. S. 388.

[21] See S. Rep. 1137, 82d Cong., 2d Sess., p. 4; H. Rep. 1365, 82d Cong., 2d Sess., p. 32.

158 U. S. 538; *Polymeris* v. *Trudell,* 284 U. S. 279; *Shaughnessy* v. *Mezei,* 345 U. S. 206.

Appellants have sought to find some comfort in *Lapina* v. *Williams,* 232 U. S. 78. But that holding summarily rejected the assertion that an alien resident of the United States has any vested right to return. For in that case the Supreme Court decided that Congress intended "to bring within the reach of the statute aliens who had previously resided in this country." 232 U. S. at 93. The Court also observed, *id.* 91, that the statute "sufficiently expressed . . . the purpose of applying its prohibition against the admission of aliens, and its mandate for their deportation, to all aliens whose history, condition or characteristics brought them within the descriptive clauses, irrespective of any qualification arising out of a previous residence or domicile in this country." Similarly, in *Lewis* v. *Frick,* 233 U. S. 291, 297, this Court held that an alien who had visited Canada briefly was subject to exclusion upon his return and that his domicile in the United States

> did not change his status so as to exempt him from the operation of the Immigration Act; * * * if he departed from the country, even for a brief space of time * * * he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country.

Probably the leading authority is *Volpe* v. *Smith*, 289 U. S. 422. There the Court upheld a deportation order against a permanent resident of the United States who had made a short visit to Cuba and who was found to have made an entry into the United States upon his return. The Court's opinion observed, 289 U. S. at 425:

> We accept the view that the word "entry" * * * includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one * * *.

The Court brushed aside the assertion that the statute operated unfairly and stated, 289 U. S. at 425–426:

> Aliens who have committed crimes while permitted to remain here may be decidedly more objectionable than persons who have transgressed laws of another country.
>
> It may be true that if Volpe had remained within the United States, he could not have been expelled because of his conviction of crime in 1925, more than five years after his original entry; but it does not follow that after he voluntarily departed he had the right of reentry. In sufficiently plain language Congress has declared to the contrary.[22]

[22] See also *Claussen* v. *Day*, 279 U. S. 398; *Stapf* v. *Corsi*, 287 U. S. 129; *Polymeris* v. *Trudell*, 284 U. S. 279. Recent reiterations of this doctrine include *Schoeps* v. *Carmichael*, 177 F. 2d 391 (C. A. 9), certiorari denied, 339 U. S. 914; *Schlimmgen* v. *Jordan*, 164 F. 2d 633 (C. A. 7).

We believe it highly appropriate to read Section 212 (d) (7) in the light of the foregoing utterances. While the reentry doctrine concerns primarily aliens returning from a foreign port or place, it seems clear that Section 212 (d) (7) was designed to assimilate Alaska to a foreign country for the purpose of limiting admissibility to the United States. This view of the statute is consistent with the legislative policy in regard to alien residents who visit foreign territory. It is consonant also with the desire of Congress to restrict the activities and the mobility of aliens charged with subversive activities in the United States.[23] And, if any further evidence were needed, it accords with the earlier administrative reading of comparable directives of the Immigration Act of 1917. *Matter of O'D.*, 3 I & N Dec. 632 (1949),[24] where it was held that a resident alien who had fled to Puerto Rico and returned

[23] See *Carlson* v. *Landon*, 342 U. S. 524.

[24] Mention should be made of the statement in S. Rep. 1515, 81st Cong., 2d Sess., p. 658, where the committee in reviewing the previous law stated: "Alien residents of the continental United States are not subject to the exclusion provisions of the act of 1917 when traveling from the continental United States to any of our insular possessions and return." This statement finds no support in any statute, administrative construction, or decision, and appears to be erroneous. Moreover, this observation related to the first draft of the socalled Omnibus Bill, which proposed to end the restrictions upon travel from territories to the continental United States. As we have pointed out (p. 44) this proposal subsequently was discarded and the committee thereafter adopted the formulation which now appears in the statute.

had made an entry into the continental United States on his return.

The arguments marshalled to confront this clear legislative purpose to treat the outlying territories as equivalent to a foreign country seem quite insubstantial. In the first place, it is said that Congress defined Alaska as part of the United States for the purposes of the immigration laws. See Sec. 101 (a) (38) Immigration and Nationality Act of 1952, 8 U. S. C. A. 1101 (a) (38). But Congress itself fashioned the definition and retained the power to modify it. The definition itself relates "except as otherwise specifically herein provided." And Section 212 (d) (7), in our view, manifestly provides otherwise, by directing, in effect, that for the purposes of that subsection Alaska is to be regarded as equivalent to a foreign country.

The same considerations apply to the definition of "entry" in Sec. 101 (a) (13) of the Immigration and Nationality Act. This definition states the general rule that entry ordinarily is accomplished by coming from a foreign port or place. But in unmistakable language Congress has modified this definition in Sec. 212 (d) (7), which declares that its commands relate to aliens who leave Alaska and seek to enter continental United States.

It is said also that it was intended to limit the impact of Section 212 (d) (7) to aliens who previously had not satisfied the requirements of

the immigration laws. But this argument overlooks the fact that at least since 1924 aliens entering Alaska have had to meet every qualification demanded by the immigration laws. Section 13 (a) and 28 (a), Immigration Act of 1924, 8 U. S. C. 213 (a) and 224 (a). Under the comprehensive language of Section 212 (d) (7), it is obvious that even if an alien was lawfully admitted to Alaska, he nevertheless must undergo an additional screening if he seeks to enter continental United States. Therefore appellants cannot support their theory that the statute was intended to have the limited application for which they argue.

Appellants also contend that the exclusion provisions apply only to immigrants and that they are no longer immigrants, since they already have been lawfully admitted for permanent residence. This contention overlooks not only the explicit directives of the statute itself, but the entire course of antecedent legislative policy. See p. 48, *supra*. The introductory language of Section 212 of the Immigration and Nationality Act, 8 U. S. C. A. 1182 stipulates that its exclusions attach to "aliens". Section 212 (d) (7) likewise refers to the exclusion of "any alien" and does not state that its restrictions are limited to alien immigrants. Moreover, even if the impact of the statute were regarded as limited to immigrants, the statute itself defines an immigrant as "every alien" except those specifically excepted, and de-

cribes nonquota *immigrants* as including resident aliens returning from a temporary visit abroad. Section 101 (a) (15) and (27), Immigration and Nationality Act, 8 U. S. C. A. 1101 (a) (15) and (27). Thus, appellants hardly can escape the reach of the statute whether they are regarded as immigrants or nonimmigrants. See *Volpe* v. *Smith,* 289 U. S. 422; *Lapina* v. *Williams,* 232 U. S. 78; *Lewis* v. *Frick,* 233 U. S. 291.

It is said that Congress could not have intended to bar the travel of an alien resident from one part of the United States to another, since such a person is not actually leaving the United States. This hypothesis is rejected by the directives of the statute itself. For even if Alaska is regarded as a part of the United States for some purposes under the immigration laws, Section 212 (d) (7) nevertheless is explicit in commanding that the exclusions of those laws shall apply to persons in that part of the United States who wish to travel to the mainland. Certainly, even appellants must admit that objectionable aliens residing in Alaska may be barred from continental United States even though it can be said that they are merely traveling from one part of the "United States" to another.[25]

In the face of the explicit language of the statute, it seems idle to conjecture about the legislative purpose. But, as we have pointed out, the

[25] For varying usages of the term "United States" see pp. 67–68.

objective of Section 212 (d) (7), manifestly is to halt the spread of subversion and the opportunities for espionage. See *Carlson* v. *Landon*, 342 U. S. 524, 535–6.[26] To paraphrase the language of this court in the *Volpe* decision, Congress deemed that aliens who have been guilty of subversion or criminal activities within the United States may be more objectionable than aliens who have offended the laws of another country.[27] Congress evidently wished to limit the mobility of such individuals and their capacity for harming the United States.

Congress was doubtless aware of the close proximity of Alaska to Soviet Siberia and the difficulty of maintaining adequate controls in the vast, sparsely-populated expanses of the Alaska outpost and its adjacent islands. Moreover, Congress undoubtedly did not regard travel from Alaska as comparable to travel within continental United States, since an alien coming from Alaska must traverse hundreds—perhaps thousands—of miles

[26] In enumerating the "basic and significant changes" accomplished by the Immigration and Nationality Act of 1952, the House Committee stated that the bill "Provides for a more thorough screening of aliens, especially of security risks and subversives." H. Rep. 1365, 82d Cong., 2d Sess., p. 28.

[27] The subversive alien, unlike one who engages in criminal activities, is deportable for obnoxious activities in the United States, without time limitation. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580. Sec. 241 (a) (6) and (7), Immigration and Nationality Act of 1952, 8 U. S. C. A. 1251 (a) (6) and (7).

of ocean or airspace which are not within the territorial confines of the United States.[28]

The supposition that the restrictions of Section 212 (d) (7) were not intended to apply to aliens returning from Alaska to a residence in the United States thus is unsupported by anything in the statute itself or in the contemporaneous expressions of Congress. It stems only from a hypothetic legislative policy which would be pleasing to appellants and which they are urging this Court to read into the law. But Congress inscribed no such limitation in the statute. And we cannot perceive any reasonable basis for departing from the normal, unambiguous meaning of the language used by Congress and embarking on a speculative effort to find another reading, not articulated in the statute and not supported by any indicia of legislative design.

The reliance of appellants on *Chew* v. *Colding*, 344 U. S. 590 likewise seems unpersuasive. That decision did not doubt the power of Congress to prescribe for the exclusion of alien residents who left the continental United States. On the

[28] According to the *World Almanac* (1953), p. 118, airline travel from Juneau, Alaska, to Seattle, Washington, traverses 870 miles and to San Francisco, California, 1530 miles. According to the same source, p. 466, the distances in nautical miles of a voyage between San Francisco, California, and various ports in Alaska are as follows: Anchorage, 1872; Dutch Harbor, 2051; Kiska, 2629; Kodiak, 1693; Nome, 2531; Sitka, 1302.

contrary, the Court merely concluded that under the factual circumstances of that case Congress could not have intended to deny Chew a hearing when he sought to return to the United States. Appellants do not refer to the subsequent decision of this Court in *Shaughnessy* v. *Mezei*, 345 U. S. 206, which described the limited reach of the *Chew* decision. In the *Mezei* case the Court carefully pointed out that "For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws." 345 U. S. at 213.[29]

[29] A question may perhaps arise as to how an order of exclusion would be accomplished. The last sentence of Sec. 212 (d) (7) states that the excluded alien "shall be immediately deported in the manner provided by section 237 (a) of this Act". Sec. 237 (a), 8 U. S. C. A. 1227 (a), specifies that an excluded alien shall be "deported to the country whence he came". This does not mean he would be deported to Alaska. "Country whence he came" is a term of art, previously used also in relation to the deportation of expelled aliens. See *Mensevich* v. *Tod*, 264 U. S. 134. It necessarily contemplates deportation to a foreign country. *Gagliardo* v. *Karnuth*, 156 F. 2d 867 (C. A. 2). And it refers to the country of nativity, unless the alien after birth acquired a domicile in another foreign country. *Schenck* v. *Ward*, 80 F. 2d 422 (C. A. 1); *Di Paola* v. *Reimer*, 102 F. 2d 40 (C. A. 2). And in the instant case it would envisage deportation to the country of nativity or nationality. *Karamoto* v. *Burnett*, 68 F. 2d 278 (C. A. 9).

III

The statute is constitutional

A. Appellants have no vested right to remain in the United States

Petitioners argue that Congress has no constitutional right to treat as an entering alien one who, after acquiring residence here, journeys to Alaska and returns. Their principal challenge appears to be bottomed on the premise that they will be denied substantive due process of law if the immigration restrictions interfere with their acceptance of employment or with the resumption of a residence in continental United States.[20] This argument, however, ignores principles established by this Court in an unbroken chain of decisions from the *Chinese Exclusion Case,* 130 U. S. 581, and *Fong Yue Ting* v. *United States,* 149 U. S. 698, through *Shaughnessy* v. *Mezei,* 345 U. S. 206.

It cannot tenably be asserted, at this late date, that an alien has inherent rights which can vanquish the paramount power of Congress to inhibit his entry or to cut short his stay in the

[20] It is also suggested that appellants would have less procedural rights because they would be subject to the exclusion process upon their return from Alaska. But the agreed findings in the pretrial order establish, for the purposes of this case, that the affected aliens would be entitled to a full hearing, with opportunity for administrative and judicial review, before they could be excluded on their return (R. 9–10). If they are denied any process to which they are entitled the avenue to redress in the courts will always be open. See *Chew* v. *Colding,* 344 U. S. 590.

United States. On the contrary, a unanimous array of pronouncements has found that Congress has unqualified authority, as an incident of sovereignty, to specify which aliens shall enter the United States and which shall be allowed to remain. Moreover, this court invariably has insisted that such power is political in nature, touching the conduct of international affairs and national defense, and is immune from challenge in the courts. And it has always been held that a resident alien cannot demand a right to remain in the United States, if Congress in the exercise of its plenary power commands that he be excluded or expelled.[31]

1. It is clear, therefore, that admission for permanent residence confers no vested right to remain in this country. Thus a majority of this Court, recently turned down a contention that "admission for permanent residence confers a 'vested right' on the alien * * * to remain within the country." *Harisiades* v. *Shaughnessy,* 342 U. S. 580, 584. In the prevailing opinion, Justice Jackson observed, 342 U. S. at 586, 587–589, 591:

> Under our law, the alien in several respects stands on an equal footing with citi-

[31] The argument that the authority to regulate immigration is limited to the commerce power hardly can be supported. On the contrary, every holding of this Court, commencing with *The Chinese Exclusion Case, supra,* has insisted that it springs from national sovereignty and relates to the conduct of international affairs and national defense.

zens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.

* * * * *

That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

* * * * *

It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

* * * * *

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation.

Justice Frankfurter's concurring opinion similarly commented, 342 U. S. at 596–597:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control.

The same concepts were underscored the same day in *Carlson* v. *Landon,* 342 U. S. 524, 534. Moreover, this doctrine can be buttressed by many declarations of this court, voiced by some of its most celebrated members. Since the question has been so recently reexamined, we refer additionally only to the observations of Justice Gray in *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711:

> The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare * * *

Justice Gray also pointed out that aliens residing in the United States:

> are entitled, so long as they are permitted by the government of the United States

> to remain in the country, to the safeguards of the Constitution, and the protection of the laws, in regard to their rights of person and property, and to their civil and criminal responsibility. But they continue to be aliens, * * * and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest.

And Judge Learned Hand recently described this concept with characteristic incisiveness in *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489, 490 (C. A. 2):

> The interest which an alien has in continued residence in this country is protected only so far as Congress may choose to protect it; Congress may direct that all shall go back, or that some shall go back and some may stay; and it may distinguish between the two by such tests as it thinks appropriate.

2. The same considerations apply *a fortiori* to an alien who seeks admittance to the United States. Though some members of this court have questioned whether the power of expulsion is unlimited, no one ever has doubted the absolute right of Congress to define the classes of aliens whose entry into the United States will be precluded. As this Court stated in *Knauff* v. *Shaughnessy,* 338 U. S. 537, 542:

> At the outset we wish to point out that an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe.

The unrestricted authority of Congress to bar aliens applying for entry likewise was endorsed in *Shaughnessy* v. *Mezei,* 345 U. S. 206, 210. Moreover, in dissenting on other grounds, Justice Jackson stated, 345 U. S. at 222–233:

> Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will.

3. It is true that so long as an alien is permitted to remain in the United States he is protected against unfair impairments of his employment opportunities. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410. But, as pointed out by Justice Jackson in the *Harisiades* case and by Justice Gray in *Fong Yue Ting* v. *United States,* these limited protections depend on continuance of his residence privileges in the United States and are subordinate to the sovereign power of Congress to withdraw such privileges at any time. Moreover, the immigration statute is not aimed, directly or indirectly, at any right or status of employment. Any im-

pact on such employment opportunities is fortuitous and results from the happenstance that the prospective employee chances to be an alien. The execution of the immigration laws frequently curtails an alien's opportunities to accept employment in the United States. But the Constitution never has been regarded as affording protection against such a remote consequence of the exertion of sovereign power. See *American Communications Assn.* v. *Douds,* 339 U. S. 382, 390, 391, 404, 405, 409; *Hamilton* v. *Board of Regents,* 293 U. S. 245; *Korematsu* v. *United States,* 323 U. S. 214.

4. Nor can appellants claim any advantage because they wish to return to a permanent residence in the United States following a temporary absence. As we have pointed out, many decisions of this court have held that an alien resident of the United States cannot demand a right to be readmitted to this country following a voluntary sojourn in a foreign country, no matter for how brief a period. In each of these holdings this court emphasized that the sweep of Congressional authority to control the entry and residence of aliens was extensive enough to include measures directed against returning resident aliens. We refer again to *Volpe* v. *Smith,* 289 U. S. 422, 425; *Lem Moon Sing* v. *United States,* 158 U. S. 538; and *Lapina* v. *Williams,* 232 U. S. 78, 88. In the *Lapina* case the Court stated:

> The authority of Congress over the general subject-matter is plenary; it may ex-

> clude aliens altogether, or prescribe the terms and conditions upon which they may come into or remain in this country. [Citing cases.]
>
> The question, therefore, is not the power of Congress, but its intent and purpose as expressed in legislation.

That returning lawful residents can be excluded by Congress was recently emphasized again by this Court in *Shaughnessy* v. *Mezei,* 345 U. S. 206, 213, where Justice Clark stated:

> For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws.

See also *The Chinese Exclusion Case,* 130 U. S. 581; *Polymeris* v. *Trudell,* 284 U. S. 279, 281.

It is thus established that the power to limit the entrance and residence of aliens is an attribute of sovereignty, essential to the national welfare and safety, and that even a resident alien cannot defeat the exercise of this plenary power by urging that he has a vested right to reenter or to remain in the United States. Since the power of Congress over the admittance and sojourn of aliens is so complete that it can bar reentry of an alien resident seeking to return from a temporary visit abroad (p. 64) and can require the expulsion of a long-time resident alien who has never left this country (p. 59), it is complete enough to per-

mit Congress to treat a journey to Alaska as a departure from the United States and a return from that journey as an entry into the United States. This is a lesser limitation of residence privileges and necessarily must be included in the fullness of Congressional power in this area.

B. Congress has the power to treat a voyage to Alaska as equivalent to departure for a foreign country for the purposes of entry into continental United States

It thus seems manifest that a resident alien cannot defeat the exercise of the plenary power to limit the entrance and residence of aliens by urging that he has a vested right to reenter or to remain in the United States. On what basis, then, can appellants summon the aid of the Constitution? Apparently their plea is rooted in a feeling that the establishment of impediments to travel of aliens between a territory of the United States and the mainland somehow violates some precept of the Constitution.

We have pointed out that restrictions against admittance from other territories of the United States have been in force for over fifty years. This circumstance alone argues weightily against a charge of unconstitutionality. *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 315. We mention also the deference due a solemn expression of the federal legislative process, and the reluctance of this Court to override it in the absence of the plainest showing of unconstitutionality. *American Communications Assn.* v.

Douds, 339 U. S. 382; *Harisiades* v. *Shaughnessy,* 342 U. S. 580. We note too the absence of any direct or indirect restraint in the Constitution itself. These are time tested aids in appraising a statute and each of them tips the scale against appellants.

Appellants' argument is, in essence, that Congress has no power to consider Alaska as different from a state of the United States and therefore cannot treat a voyage as a departure from the United States and an entry therefrom as a new entry into the United States. Alaska, is, however, not a state of the United States; it is an organized territory of the United States. *Binns* v. *United States,* 194 U. S. 486, 491. And Alaska is not a part of the continental United States, but separated from it by a large expanse of land or water. These two factors, singly and together, establish that Alaska may be treated differently from the states of the United States for many purposes, including departure and entry under the immigration laws.

Viewed against the backdrop of our national domain, it is manifest, of course, that Alaska is not foreign territory. *American Railroad Co.* v. *Didricksen,* 227 U. S. 145; *DeLima* v. *Bidwell,* 182 U. S. 1. But this does not mean that it must be regarded as part of the United States for every purpose. It is well known that the term "United States" may have varying connotations. Thus in some usages it may describe the

sovereign power of our nation, in others it "may designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution." *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 671–2. See 1 Willoughby, *Constitutional Law* (2d Ed., 1929), 475; Langdell, *The Status of Our New Territories,* 12 Harv. L. R. 365 (1899). Whether Alaska is to be regarded as part of the United States within the contemplation of a statute or of the Constitution depends on the context. Cf. *Mullaney* v. *Anderson,* 342 U. S. 415; *Alaska* v. *Troy,* 258 U. S. 101.

In the *Insular Cases* and in subsequent decisions this Court has evolved practical formulas for assessing the status of the inhabitants of our noncontiguous possessions. See 1 Willoughby, *Constitutional Law,* 479 *et seq.; Alaska and Hawaii: From Territoriality to Statehood,* 38 Cal. L. R. 273 (1950); Irion, *Areas Under the Jurisdiction of the United States,* 17 George Wash. L. R. 301 (1949). An important facet of these territorial doctrines is that insofar as the Constitution safeguards the "fundamental rights of the individual", and thus inhibits any action by federal officers, it applies in the United States and all its territories, whether incorporated or unincorporated. *Farrington* v. *Tokushige,* 273 U. S. 284, 299; *Hawaii* v. *Mankichi,* 190 U. S. 197, 218; *Duncan* v. *Kahanamoku,* 327 U. S. 304; *Kepner* v.

United States, 195 U. S. 100; *Soto* v. *United States,* 273 Fed. 628 (C. A. 3). But we are not aware of any "fundamental" right assuring to aliens in Alaska unlimited access to continental United States. On the contrary, as we have pointed out, the entire course of American constitutional doctrine negates the existence of any such absolute right of entry or residence.

Moreover, we know of no constitutional prohibition circumscribing the authority of Congress to impose restrictions on the travel of aliens between a noncontiguous territory and the mainland. Indeed, the only provision of the Constitution in which territories are mentioned is Article IV, Section 3, Clause 2, which specifies:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

From the breadth of this language, it seems overwhelmingly evident that the Framers intended to bestow upon Congress complete power to legislate [32] for the territories.[33] And this Court fre-

[32] The constitutional reference to making regulations patently includes laws. *Dorr* v. *United States,* 195 U. S. 138, 146.

[33] Among the supporting evidence is the fact that the Commerce Clause, Art. I, Sec. 8, Cl. 3, confers authority on Congress "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," but does not mention commerce with territories. The obvious implication is that complete power is given in the Territorial Clause.

quently has characterized such legislative power over the territories as plenary.

That Congress has ample authority to make special dispensations for commerce and travel to and from Alaska is the direct holding of *Alaska* v. *Troy*, 258 U. S. 101. There a statute giving preference to the ports of the states over those of Alaska was attacked "upon the ground that the regulation of commerce prescribed therein gives a preference to ports of the Pacific Coast States over those of Alaska, contrary to Sec. 9, Art. I, Federal Constitution—'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another'." 258 U. S. at 109. The challenge was rejected unanimously, and the Court stated, 258 U. S. at 111:

> The appellants insist that "State" in the preference clause includes an incorporated and organized territory. This word appears very often in the Constitution and as generally used therein clearly excludes a "Territory". To justify the broad meaning now suggested would require considerations more cogent than any which have been suggested. *Obviously, the best interests of a detached territory may often demand that its ports be treated very differently from those within the States.* And we can find nothing in the Constitution itself or its history which compels the conclusion that

> it was intended to deprive Congress of power so to act. [Emphasis added.]

Also significant is *Binns* v. *United States,* 194 U. S. 486, 491. In that case a license tax applicable only to Alaska was upheld. The Court found the constitutional provision for uniformity of taxes throughout the United States not applicable to Alaska, and observed:

> Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution * * *

In *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, a tax law applicable specially to the Philippine Islands was sustained. The Court found that even if a like tax applicable to a state would be invalid it does not follow "that such a tax for the uses of a territory or dependency would likewise be invalid. A state, except as the Federal Constitution otherwise requires, is supreme and independent". 301 U. S. at 317. The Court then declared, *id.* 323:

> In dealing with the territories, possessions and dependencies of the United States, this nation has all the powers of other sovereign nations, and Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of states in union."

And in *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, the Court upheld the propriety of a tax imposed by a state upon imports from the Philippine Islands and found that under certain circumstances it was entirely proper to regard territory of the United States as equivalent to a foreign country. Again the Court pointed out, 324 U. S. at 674, that in legislating for the territories,

> Congress is not subject to the same constitutional limitations, as when it is legislating for the United States.

See also *Inter-Island Steam Nav. Co.* v. *Hawaii,* 305 U. S. 306; *Downes* v. *Bidwell,* 182 U. S. 244.

These authorities establish decisively, we believe, that complete power resides in Congress to deal specially with travel and commerce from Alaska.[34]

Moreover, the special situation of a noncontiguous territory like Alaska generates an additional source of legislative power. For in journeying from Alaska an alien must leave the territorial limits of the United States. Since he thereafter seeks to enter from outside the United States we believe his situation clearly falls within the zone of sovereign legislative power to restrict entries from outside the United States. The

[34] In addition to the examples cited in the above cases, there have been a number of other instances, outside of immigration laws, of special legislative dispensations in regard to Alaska. See comment, *Alaska and Hawaii: From Territorality to Statehood*, 38 Cal. L. R. 273, 282 (1950); Act of April 29, 1902, 32 Stat. 172; cf. 48 U. S. C. 1486.

enactment of Section 212 (d) (7) was therefore fully within the competence of Congress.

Even if we were to assume that power to deal with travel to a territory of the United States is subject to the due process clause it seems to us that there clearly is a reasonable basis for treating Alaska and other noncontiguous territory as different from the continental United States for the purposes of the immigration laws. In enacting this statute Congress doubtless took into account the special problems posed by Alaska's size, its scant population, its proximity to Soviet Siberia, the difficulty of establishing adequate controls to prevent the movement of spies, saboteurs and subversives, the distances to be traversed across foreign territory and waters in traveling from Alaska to continental United States, and the need for providing a screening process at the ports of entry in the United States in order to close an avenue affording the possibility of easy entrance for subversives and other undesirables.[35]

Even citizens of the United States cannot claim an unlimited right of free movement which can nullify precautionary measures adopted by the federal government in fulfilling legitimate national needs. Thus, quarantine laws safeguarding the public health are an obvious example of

[35] See H. Rep. 675, 83rd Cong., 1st Sess., pp. 6, 14, which refers to the fact that from Alaska, "Across a narrow strip of water, Siberia can be seen with the naked eye."

legislation properly restricting free movement.[36] Another example is the selective service legislation enacted during time of war or danger.[37] Also sustained have been extreme measures limiting the mobility of West Coast residents of Japanese ancestry, citizens and aliens, under wartime conditions of peril.[38] Federal mandates for the registration of aliens likewise are valid,[39] as are summary procedures for the internment and removal of alien enemies.[40] Additional restrictions limit the movement of alien enemies during wartime,[41] and other edicts sanction restricted mobility of citizens and aliens during time of war or national emergency.[42]

These examples are displayed merely to illustrate the wide expanse of federal power. They demonstrate decisively, we believe, that under exigent circumstances, arising out of a national

[36] *Thornton* v. *United States*, 271 U. S. 414; *Mintz* v. *Baldwin*, 289 U. S. 346; *Compagnie Francaise* v. *Louisiana State Board of Health*, 186 U. S. 380.

[37] *Selective Draft Law Cases*, 245 U. S. 366; *United States* v. *Henderson*, 180 F. 2d 711 (C. A. 7), certiorari denied, 339 U. S. 963.

[38] *Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214.

[39] *Hines* v. *Davidowitz*, 312 U. S. 52; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *United States* v. *Franklin*, 188 F. 2d 182 (C. A. 7); *Gancy* v. *United States*, 149 F. 2d 788 (C. A. 8), certiorari denied, 326 U. S. 767.

[40] *Ludecke* v. *Watkins*, 335 U. S. 160.

[41] Presidential Proclamations 2525, 2526, 2527, 2537, and 2563, 6 F. R. 6321, 6323, 6324, 7 F. R. 329, 5535.

[42] Presidential Proclamations 2523, 6 F. R. 5821, and 3004, 18 F. R. 489.

need, even some restrictions upon travel between states might well be deemed justified. But this question is not now before the Court. In view of the plenary power of Congress over the territories, and its unqualified power to regulate the entry and expulsion of aliens, Congress clearly has the power to determine that a voyage to Alaska shall be deemed a departure from the United States for the purposes of the immigration laws.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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Immigration and Naturalization Service.

DECEMBER 1953.

APPENDIX

[Air Mail]

DECEMBER 17, 1953.

Commissioner, Central Office, Washington, D. C.
John P. Boyd, District Director,
Seattle, Washington.

Alien Alaska arrivals.

(Attention: Mr. L. Paul Winings, General Counsel.)

With reference to your telegram of December 14, 1953, the following information is forwarded:

The total number of aliens returning from Alaska during the period July 1–November 1, 1953, is estimated to be 3,131. This estimate is based on an actual manifest count of the September 1953 Alaskan alien arrivals. No alien was excluded without a hearing. Thirty-four cases were held upon arrival from Alaska for possible exclusion during the period July 1–November 1, 1953. Of this number 12 were released following a secondary examination, 15 were referred to Special Inquiry Officer, and 7 were referred to Investigation Section for Warrant proceedings. Of this last group the following disposition has been made: (1) one seaman and a citizen of Lithuania was ordered deported and is presently paroled under bond awaiting procurement of a travel document; (2) one, a citizen of Poland, was ordered deported and is presently paroled awaiting travel documents; (3) one was granted a stay of deportation pending presiden-

tial action on a pardon; (4) one was appealed to the B. I. A. and is still pending; (5) one was allowed voluntary departure and granted permission to reapply after deportation; (6) one was placed under a warrant of arrest, given a hearing and allowed to apply for discretionary action under Section 212 (c) of the Immigration and Nationality Act, action upon which is still pending; and (7) one was paroled and warrant of arrest served November 13, 1953. Parole was continued and he is scheduled for a hearing December 22, 1953.

Of those referred to the Special Inquiry Officer, six were admitted under waivers of inadmissibility and their cases certified to the B. I. A. for approval as required by OI 236.14 I (three have been sustained and three are still pending), two were excluded as aliens convicted of crimes involving moral turpitude, to wit, burglary and grand larceny, and 7 cases are still pending awaiting completion of investigation required before action can be taken on application for waiver of inadmissibility.

Of the 19 cases held for warrant proceedings or Special Inquiry hearings, 9 were paroled under bond and the remaining number were paroled without bond.

No record is kept of the union affiliation of various Alaskan alien or citizen arrivals returning from cannery work. Of those detained at Seattle, 12 aliens were known to be members of the ILWU and one was a member of the Alaska Fish Cannery Workers' Union, an affiliate of the AFL. The ILWU secured the services of a local lawyer for any of their members who were de-

tained and in this way the membership in that particular union was brought to the attention of this office.

Basis of action in all of the cases detained for Special Inquiry Officer hearings was their conviction for crimes involving moral turpitude (Section 212 (a) (9) of the Immigration and Nationality Act).

U. S. GOVERNMENT PRINTING OFFICE: 1953